

8 Official Opinions of the Compliance Board 42 (2012)

- ◆ Exceptions Permitting Closed Sessions
 - ✧ Legal Advice - Within exception
 - ✦ Discussion with counsel of affordability of settlement offers
 - ◆ Exceptions Permitting Closed Sessions
 - ✧ Litigation - Within exception
 - ✦ Discussion about status of settlement negotiations
 - ◆ Compliance Board - Authority and Procedures
 - ✧ Jurisdictional limits
 - ✦ No authority to compel production of document
 - ◆ Records
 - ✧ Open session
 - ✦ Minutes to be available to members of public, including those participating in litigation against public body
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March 16, 2012

Re: *Salisbury City Council: Bruce F. Bright, Esquire*

We have considered the complaint of Bruce F. Bright, Esq., (“Complainant”¹), that the Salisbury City Council (“Council”) violated the Open Meetings Act (“the Act”) by closing certain meetings to the public. We have also considered the response submitted by the City of Salisbury (“City”) and the parties’ other submissions.

The meetings in question occurred in 2011 and took place against the backdrop of pending litigation. In 2009, the City sued O’Brien & Gere Engineers, Inc. (“Engineers”) and other defendants for damages allegedly arising from their conduct with regard to the upgrade of the City’s wastewater treatment plant (the “plant”). The City filed that action in the Circuit Court for Wicomico County. In February, 2010, the Maryland Department of the

¹As the complaint was signed by Mr. Bright, we deem him to be the complainant under SG § 10-502.5(b). The Engineers’ attorney, on whose behalf Mr. Bright submitted it, did not sign it.

Environment (“MDE”) filed a civil enforcement action against the City, also in that court, for violating the terms of the joint State/federal permit which governs discharges from the plant into the Wicomico River. In October, 2010, the City filed in the same court a petition for judicial review of a decision by MDE that the City was not eligible for certain funding for enhanced nutrient removal measures for the plant. The City states that the City’s permit requires the City to construct a “plant upgrade” at a cost of approximately \$60,000,000, that the City is negotiating the terms of consent order with MDE, and that, to conduct those negotiations, City officials must determine “the affordability of a new bond issuance....” Further, the Council states, a “key component” of the settlement negotiations is the grant and loan package to be provided by MDE to the City.

The City states that the Council held three closed meetings, all “includ[ing] a discussion of the MDE litigation and settlement negotiations.” Those meetings occurred on February 14, 2011, April 19, 2011, and May 2, 2011. The closing statement² for each meeting cites, as authority for the closing, State Government Article (“SG”) §§ 10-508(a)(7) and 10-508(a)(8). SG § 10-508(a)(7) authorizes a public body to close a public meeting in order to “consult with counsel to obtain legal advice on a legal matter”; SG § 10-508(a)(8) authorizes a closed session in order to “consult with staff, consultants, or other individuals about pending or potential litigation.” As the “reason for the closing,” the closing statements list “Pending litigation” and “consult with legal counsel,” and all identify the plant or the plant “litigation” as the “topic to be discussed.” The City has informed the Engineers’ counsel that the City will not provide him with the minutes of its closed meetings. Complainant asserts that the Council’s discussions of funding options, and, specifically, the option of raising the City’s debt limit, involved broad policy matters not within any exception to the Act’s requirement that public bodies conduct public business publicly. Complainant also states that the City has not produced documents pertaining to the closing of the meetings.

The City has provided us with copies of the sealed minutes of the meetings in question. Each set confirms that the Council members met with counsel in closed session to receive updates on the settlement negotiations with MDE and advice on the City’s funding options. The minutes do not suggest that the

²By “closing statement,” we mean the statement that a public body’s presiding officer must complete before the public body meets in closed session to exercise a function within the Act. That statement must identify the statutory authority, or “exception” relied upon as a basis for the closing, the topics to be discussed, and the reason for the closing. SG § 10-508(d)(2)(ii).

Council members used the sessions to discuss broader policy issues. The topic of how a public body will finance a certain public initiative is public business and must ordinarily be discussed in an open meeting. *See* SG § 10-505. However, when the initiative in question is an as-yet unconsummated settlement, the members are meeting to discuss their options with the public body's attorney, and the disclosure of the discussion could compromise the negotiations, the topic may fall within the exceptions provided by SG §§ 10-508(a)(7) and 10-508(a)(8). This appears to be such a case.

Nonetheless, by way of a cautionary note, a discussion of a public body's settlement options can very easily slide into a discussion focused instead on broader issues. *See, e.g., 1 OMCB Opinions* 56, 60 (1994) (the SG § 10-508(a)(8) exception extended to the public body's discussion of options for settling an anticipated claim by a day care operator, but not to its discussion of options to be pursued in case the center closed); *see also 3 OMCB Opinions* 233 (2002) (the SG §§ 10-508(a)(7) and (8) exceptions extended to town council's discussion of claims by landowners whose wells would be affected by the drilling of new town wells, but not to an MDE employee's presentation of background information because he was not acting as the town's consultant on the potential litigation). And, of course, once settlement is reached, the "pending or potential litigation" exception provided by SG § 10-508(a)(8) would no longer apply. Similarly, the SG §§ 10-508(a)(7) "advice of counsel" exception ceases to apply once the advice has been given. *See 7 OMCB Opinions* 148, 152-53(2011) (discussing the point at which the "advice of counsel" exception ceases to apply).

With respect to the City's production of documents, we do not have the authority either to compel the production of documents or to address Complainant's allegations concerning the Public Information Act ("PIA"). Under the Open Meetings Act, however, closing statements are a matter of open record and, as with open-sessions minutes, should be made available for inspection at the City's offices. SG §§ 10-508(d) and 10-509(d). When, as appeared to have happened here, a person includes a request for Open Meetings Act documentation in a PIA request, we encourage public bodies to inform the person that the Act entitles the person to inspect the documentation in person and without charge. *See 8 OMCB Opinions* 1, 3-4 (2012) (discussing the documents which the Act requires a public body to make available for inspection under the Act). The fact that the person represents a party in litigation with the public body, or that the request may also have been made during discovery in that litigation, has no bearing on a public body's duties under the Act.

In sum, on the basis of the minutes provided to us under seal, we find that the Council did not violate the Act when a quorum of its members met in closed sessions to discuss settlement negotiations and options specific to ongoing litigation and to receive advice of counsel.

Open Meetings Compliance Board

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